United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4249

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4249
No. 76-4009
No. 76-4042
No. 76-4043
(Consolidated)

INTERNATIONAL TERMINAL OPERATING COMPANY ET AL.

Petitioners

v.

CARMELO BLUNDO ET AL.

Respondents

B
P/S

ON PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

BRIEF FOR RESPONDENT
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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6

INDEX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISION — Page

MISCELLANEOUS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the Benefits Review Board's consistent construction of the shoreside coverage of the amended Longshoremen's Act, developed and applied in some fifty cases since the 1972 amendments to the Act, as including all waterfront cargo-handling operations - from receipt of the cargo at the waterfront pier or terminal until stowage aboard ship, and from breaking out from ship's hold until delivery to a trucker or other carrier -, rather than as limited to that small (and shrinking) portion of such operations conducted seaward of the cargo's "last (first) point of rest ashore," a permissible reading of the amended Act?

2. Does Congress lack the constitutional authority to extend a federal workers' compensation remedy to workers in maritime industries for injuries sustained on land in waterfront locations?

COUNTERSTATEMENT OF THE CASE

These cases arose upon the filing of claims for compensation by Ralph Caputo, Anthony Dellaventura, John Scaffidi and Carmelo Blundo, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 et seq. (Supp. II, 1972) (hereinafter referred to as the Act, or as the Longshoremen's Act), and the regulations promulgated thereunder, 20 CFR 702.201 et seq. (1975). After a formal administrative hearing in each case, 33 U.S.C. 919(d) (Supp. II, 1972), 20 CFR 702.331 et seq., compensation orders were issued and filed in the Office of the Deputy Commissioner for the Second Compensation District. 20 CFR 702.349. In each case the claimant was found by the administrative law judge to have sustained an injury compensable under the

Longshoremen's Act. These orders were appealed to the Benefits Review Board,[1/] 33 U.S.C. 921(b) (Supp. II, 1972), 20 CFR 702.391 et seq. (see 20 CFR 802.201 et seq.), and decisions were issued (Caputo, November 17, 1975; Dellaventura, October 9, 1975; Scaffidi, December 8, 1975; Blundo, October 30, 1975), affirming the compensation orders in all respects. Thereafter, petitions for review were timely filed with this Court in each of the cases except Dellaventura.[2/] On April 6, 1976, the Court ordered the four cases consolidated.

As noted above, the sole issue in these appeals is whether the injuries sustained by each of the claimants, arising out of and in the course of their employment, are compensable pursuant to the provisions of the Longshoremen's Act, as amended. The circumstances surrounding the injuries sustained in each case are as follows:

1/The 1972 Amendments to the Act, P.L. 92-576, § 15(a), 86 Stat. 1251, 1261 (1972), amending Act § 21(b), as amended, 33 U.S.C. 921(b) (Supp. II, 1972), provided, inter alia, that review of decisions of administrative law judges would be before the Benefits Review Board rather than the federal district court for the district in which the injury occurred, as provided by § 21(b) of the pre-amendment Act, 33 U.S.C. 921(b) (1970 ed.).

2/On February 24, 1976, the Director, Office of Workers' Compensation Programs, moved to dismiss the petition for review filed therein by Pittston Stevedoring Corporation and Home Insurance Company, on the ground that said petition was untimely filed. Oral argument was requested by petitioners and held on March 16, 1976; following argument the motion was referred to this panel for disposition. The Director therefore respectfully renews his motion to dismiss and refers the Court to his self-explanatory motion of February 24, 1976.

1. Ralph Caputo

Caputo had been a longshoreman for 28 years and a member of Local 1814 of the International Longshoremen's Association. He usually worked on a "gang" for Pittston Stevedoring Corporation, loading and unloading cargo in a terminal or in the hold of a ship, lighter, or barge. However, when there was no work assignment for his regular "gang," he sought similar work with other maritime employers through the Waterfront Commission hiring hall.

On April 16, 1973, he sought an assignment at the hiring hall and was sent to Northeast Marine Terminal Company's 39th Street Pier as an "extra labor" terminal worker. He was loading a consignee's truck with cargo which had been discharged from a vessel when he slipped and injured his left foot on a dolly he was using to move the cargo further into the truck.

2. Anthony Dellaventura

Dellaventura had been a longshoreman for 29 years and was injured in the course of his employment with Pittston Stevedoring Corporation on June 27, 1973, while loading a truck at Pier 20, Staten Island, New York, with bags of coffee that had been removed from a ship and were to be delivered to the consignee.

At the facility in question, cargo may not remain on the Pier more than 10 days before it is picked up for further trans-shipment or else a demurrage fee will be charged to consignee. Pittston has no warehouse facility at Pier 20 and if cargo must be warehoused, the warehousing is done by employees of Pouch Terminal, Inc. The only exception to the demurrage penalty is that no demurrage fee will be charged if cargo cannot be released for further trans-shipment because it is damaged, does not clear customs, or cannot get a health certificate. In the instant case, the cargo had been removed from the ship approximately 133 days prior to claimant's accident but consignee was not charged a demurrage fee or warehouse fee.

3. John Scaffidi

Scaffidi was a longshoreman employed by Pittston Stevedoring Corporation since 1947 to load and unload cargo and containers from ships. Generally, he worked on the dock, driving fork-lifts, trucks, tractors, and hustlers.

On the day of the accident, Scaffidi was assigned to take cargo by hustler, which is a form of tractor, to Pier 12 at Buttermilk Channel, Brooklyn, New York, to be placed on board a ship. When he reached the loading dock at Pier 12 and

attempted to open the container of cargo, a case fell out and hit him on his head, shoulder, hip, and left foot. Pier 12 is used solely for loading and unloading of vessels. Furthermore, Pittston's own witnesses testified that Scaffidi's duties of driving a truck and moving cargo are incidental to and a necessary part of the loading and unloading of vessels and that all equipment used by Scaffidi was special equipment used in such loading and unloading. Loading a vessel was defined by Pittston's insurance manager to include each step taken physically in relation to cargo from the time it is received from a truck until it gets on board a ship.

4. Carmelo Blundo

Blundo was injured while in the employ of International Terminal Operating Company, Incorporated, at the 21st Street Pier in Brooklyn, New York, on January 18, 1974. The pier runs approximately 1,000 feet from 19th to 21st Street, and extends approximately 700 feet from the feet of said streets out to the water's edge. The entire pier is enclosed, with two guarded gates permitting ingress and egress. Extending perpendicularly from the end of the pier out into the water are finger piers

which can accommodate up to five ships for loading and unloading. At the time of Blundo's injury, in addition to discharging cargo from ships, I.T.O. used the pier to strip cargo from containers which had been discharged from ships at another facility and brought by truck to the 21st Street Pier. Blundo was checking cargo being stripped from such a container, located about 30-40 feet from the water's edge at the 19th Street end of the Pier, when he slipped on some ice, fell, and was injured.

ARGUMENT

I

THE DECISIONS BELOW, HOLDING THE INJURIES SUSTAINED BY RALPH CAPUTO, ANTHONY DELLAVENTURA, JOHN SCAFFIDI AND CARMELO BLUNDO COMPENSABLE UNDER THE LONGSHOREMEN'S ACT, AS AMENDED, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE AND ARE IN ACCORDANCE WITH LAW.

The scope of review of the findings below is governed by well established principles. Such findings in cases arising under the Longshoremen's Act may not be disturbed unless they are unsupported by "substantial evidence on the record considered as a whole," O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 367 (1968), or are "forbidden by the law," Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 478 (1947). That the "basic facts" are undisputed, and

the finding of which review is sought is more a legal inference than a factual one, does not authorize a broader scope of review. Cardillo, supra, 330 U.S. at 478; O'Keeffe v. Smith Associates, 380 U.S. 359, 363 (1965). In short, the reviewing court's function is exhausted when it appears that there is warrant in the evidence and a "reasonable legal basis" for the administrative award. Cardillo, supra, 330 U.S. at 479. The substitution of administrative law judges for the deputy commissioners who previously adjudicated cases under the Act,[3/] and of the Benefits Review Board for the United States district courts which formerly performed the function of initial review of compensation orders,[4/] has not altered these settled principles. As this Court noted in Potenza v. United Terminals, Inc., 524 F.2d 1136, 1137 (2d Cir. 1975):

> On review by the Board, the findings of fact of the administrative law judge are 'conclusive if supported by substantial evidence in the record considered as a whole.' 33 U.S.C. 921(b)(3). Although

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3/Pub. L. 92-576, § 14, 86 Stat. 1251, 1261 (1972), amending Act § 19(d), as amended, 33 U.S.C. § 919(d) (Supp. II, 1972).

4/See n.1, supra at 3.

> the quoted statutory language appears to apply in terms only to review by the Board, the legislative history makes clear, as must logically be the case in any event, that the same standard was intended to apply to review in the courts of appeals. See H.R. Rep. No. 92-1441, 1972 U.S. Code Cong. & Admin. News p. 4698, at 4709, 4718.

Accord, Offshore Food Service, Inc. v. Benefits Review Board, 524 F.2d 967 (5th Cir. 1975); Nardella v. Campbell Machine, Inc., 525 F.2d 46 (9th Cir. 1975); Evening Star Newspaper Co. v. Kemp, ___ F.2d ___, No. 74-2132 (March 26, 1976), petition for rehearing en banc denied (April 30, 1976). Cf. Act § 21(b)(3), as amended, 33 U.S.C. 921(b)(3) (Supp. II, 1972).

The hallmark of the Act, as remedial legislation, is that it is to be liberally construed in favor of claimants so as to effectuate its humanitarian purpose of providing relief to injured employees. Voris v. Eikel, 346 U.S. 328, 333 (1953). To accomplish this purpose, doubts, both legal and factual, are to be resolved in favor of injured employees. Friend v. Britton, 220 F.2d 820 (D.C. Cir.), cert. denied sub nom. Harry Alexander, Inc. v. Friend, 350 U.S. 836 (1955); Potomac Electric Power Co. v. Wynn, 343 F.2d 295, 299 (D.C. Cir. 1965) (concurring opinion); Young & Co. v. Shea, 397 F.2d 185, 188 and 404 F.2d 1059, 1061-62 (5th Cir. 1968), cert. denied, 395 U.S. 921 (1969).

This general policy is aided, with respect to the Act's "coverage" in particular, by the statutory presumption "that the claim comes within the provisions of this Act." § 20(a), 33 U.S.C. 920(a). See, e.g., Cardillo v. Liberty Mutual Insurance Co., supra, 330 U.S. at 474; Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1296 (2d Cir. 1974). Thus the statutory requirements for the Act's application should be read expansively; "'* * * the broadest ground [the Act] permits of should be taken.'" Calbeck v. Travelers Insurance Co., 370 U.S. 114, 130 (1962), quoting DeBardeleben Coal Co. v. Henderson, 142 F.2d 481, 484 (5th Cir. 1944). See also Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645-47 (2d Cir.), cert. denied, 382 U.S. 835 (1965). Hence, unless the meaning of the Act's coverage provision clearly preclude its application to the claimants' injuries, the decisions of the Benefits Review Board must be affirmed.

Finally, the construction given a statute by the officer or agency charged with its administration is entitled to deference upon judicial review. Johnson v. Robinson, 415 U.S. 361, 368 (1973); Udall v. Tallman, 380 U.S. 1, 16 (1965). In the instant case the decisions below reflect the contemporaneous

and consistent interpretation of the Act's coverage by the Director, Office of Workers' Compensation Programs, who is charged with the administration of the Act, and all of the Board's prior decisions as the agency's final reviewing body.

Prior to the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251 (hereinafter referred to as the 1972 Amendments, or as the Amendments), the Longshoremen's Act provided compensation only for injuries sustained "upon navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970 ed.). In Nacirema Operating Company v. Johnson, 396 U.S. 212 (1969), the Supreme Court rejected the argument that because of the claimants' status as longshoremen the Act covered their pierside injuries. The Court concluded that the statutory language which limited coverage to injuries "upon the navigable waters * * *" could not be construed to include shoreside injuries. The Court, however, did not suggest that coverage could not be so extended. The Court noted that any arguments favoring such an extension must be addressed to Congress. Cf. Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), discussed infra at 20-25.

The 1972 Amendments to the Act were Congress response to the Court's invitation to provide a uniformly applicable compensation remedy for, among others, longshoremen injured in the course of their employment at a waterfront facility, including shoreside areas. Thus, compensation benefits are payable

> * * * in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *
>
> [1972 Amendments, § 2(c), 86 Stat. 1251, 33 U.S.C. 903(a) (Supp. II, 1972) (emphasis supplied).]

In addition to expanding the geographical area of the Act's applicability, Congress eliminated the strict situs orientation of the Act by conditioning coverage upon a showing that a claimant satisfies a "status" test:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include

> a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.
>
> [1972 Amendments, § 2(a), 86 Stat. 1251, 33 U.S.C. 902(3) (Supp. II, 1972 (emphasis supplied).]

Thus, the 1972 Amendments established a new, two-pronged test for purposes of determining coverage, namely, "situs" and "status." The Director submits that each of the claimants herein met the situs and status provisions requisite for coverage under the Act.[5/]

A. Claimants were employees within the meaning of § 2(3) of the Act, as amended, 33 U.S.C. 902(3) (Supp. II, 1972).

In amending the Longshoremen's Act, Congress recognized the inequity of providing coverage solely on the basis of which side of the water's edge the injury occurred on.

The Amendments, therefore, were fashioned to provide a uniform system of compensation for injuries, whether sustained upon the navigable waters or on land, by workers who are customarily considered to be working in the business of handling waterborne cargo at a waterfront facility. See 118 Cong. Rec. 36389.

5/The appeals in Dellaventura and Caputo do not challenge the findings below as to "situs," but are based on those claimants' lack of "status" under § 2(3) of the Act, 33 U.S.C. 902(3) (Supp. II, 1972).

The amended definition of "employee" thus covers

> * * * any person engaged in maritime employment, <u>including any longshoreman or other person engaged in longshoring operations</u>, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker * * *.
>
> [33 U.S.C. 902(3) (Supp. II, 1972) (emphasis supplied).]

The use of the phrase "maritime employment" is not a limitation or further restriction on the determination of coverage of persons who are "longshoremen or other persons engaged in longshoring operations." "Maritime employment," as used in the Act, is a general term which specifically includes the subsequently enumerated categories. Indeed, the word "include" in definitional provisions is usually a term of enlargement and not of limitation. <u>See Federal Land Bank</u> v. <u>Bismarck Lumber Co.</u>, 314 U.S. 95 (1941); <u>Argosy Limited</u> v. <u>Hennigan</u>, 404 F.2d 14 (5th Cir. 1968); <u>American Federation of Television & Radio Artists</u> v. <u>N.L.R.B.</u>, 462 F.2d 887 (D.C. Cir. 1972). By this definition, Congress specifically

included such persons within the term "maritime employment" and any construction of this definition which limits these specific inclusions is contrary to the plain language of the Act and is destructive of congressional intent.[6/] Indeed, as noted in a leading treatise:

6/The United States Court of Appeals for the Fourth Circuit has recently issued an opinion interpreting the 1972 Amendments as to shoreside injuries. In I.T.O. Corporation of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), (2-1 decision) rehearing en banc granted March 12, 1976, the majority did conclude that "coverage is limited by the concept of 'maritime employment'." 529 F.2d at 1081.

We submit that not only is this construction of "maritime employment" erroneous, but that it also conflicts with the majority's own conclusion relative to the Act's "situs" test:

> The situs requirement has been retained with the definition of 'navigable waters' expanded to include certain specified land areas. * * *
>
> * * * * *
>
> We have no doubt that each of the claimants satisfies the situs test of the post-1972 Act. As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel.
>
> [529 F.2d at 1083 - 84 (emphasis supplied).]

It should be noted that reargument en banc was held in I.T.O. on May 4, 1976.

> It is evident that the intent of the Congress in defining the term employee as it has in this Act [amended Longshoremen's Act] is to include within the coverage of the Act all maritime employees, other than those specifically excluded. In order to leave no room for any doubt, longshoremen and other persons performing longshoring operations are specifically included, and so are harbor workers, ship repairmen, shipbuilders, and shipbreakers so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of the term 'maritime employment'.
>
> [1A Benedict on Admiralty § 16 (7th ed. (rev.) 1973) (emphasis supplied).]

Moreover, the correctness of this analysis is readily apparent by the specific inclusion of shipbuilders within the definition of "employee." Shipbuilding has not traditionally been cognizable within admiralty and maritime jurisdiction. See, e.g., Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922). It is an elementary rule of statutory construction that Congress is aware of the law, and further, that it does not perform a useless act. However, petitioners' assertion that satisfaction of the traditional concept of "maritime employment" is required

of all who are deemed to be "employees" would mean that a shipbuilder, in order to be covered, must prove that he was engaged in traditional "maritime employment." The absurdity of this reasoning is apparent.[7/]

Any reliance petitioners place on the opinion in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), rehearing denied, February 9, 1976, petition for cert. filed, No. 75-1620 (May 6, 1976), for the proposition that the Act's reference to maritime employment would bar coverage of the instant claimants is misplaced. Beyond the holding that the broad rule of Calbeck v. Travelers Insurance Co., supra (that the Act covered all injuries which actually occurred on the water) was legislatively overruled by the 1972 Amendments, everything in the Court's opinion in Gilmore is obiter dictum. No question of the amended Act's shoreside coverage was briefed to the Court nor raised by any party at oral argument. Even in that regard, however, it should be noted that at the outset the Court commented that

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7/Shipbuilders were covered under the pre-amendment Act. Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962). In Calbeck, however, the claimed injuries occurred on navigable waters and in general that fact alone was sufficient to prove that the "employee" was engaged in maritime employment. See, e.g., Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953). And, as noted hereinbefore, the pre-amendment Act only required an employee to prove that he was employed by an "employer" within the meaning of the Act. O'Rourke, supra. The amended Act, however, now requires a shipbuilder to prove his own status, and coverage extends not only to shipbuilders injured on navigable waters but includes shoreside injuries.

> § 902(3) * * * does not define the phrase 'engaged in maritime employment' other than to indicate that the phrase includes 'any longshoreman * * * harbor worker * * * ship repairman,' etc.
>
> [528 F.2d at 959 (emphasis supplied).]

In the instant case, the Director submits that the traditional meaning of the term "maritime employment" is neither restrictive nor relevant in determining claimants' status. The Act's benefits cannot be denied them unless there is a finding that they are neither longshoremen nor persons engaged in longshoring operations; satisfication of either classification is sufficient.

From the plain language of the statute it is apparent that Congress included a "longshoreman" within the Act's coverage. That this inclusion is more than merely descriptive of a work activity, but is intended to include an identifiable and recognized class of workers, is suggested by the statutory phrase "longshoreman or other person engaged in longshoring operations." (Emphasis supplied.) This definition, therefore, specifically includes a worker designated and recognized to be a "longshoreman." Had Congress not intended this result, there would have been no need to specifically refer to "any longshoreman." Rather, Congress could have simply defined an "employee" as:

> * * * any person engaged in maritime employment including any person engaged in longshoring operations.

The definition does include the term "longshoreman," however, and, therefore, this term must be applied.[8/] The absence of a definition of the term "longshoreman" does not preclude its applicability nor does it require the reliance upon the legislative history. The rules of statutory construction provide, rather, that absent a showing to the contrary, statutory terms must be accorded their usual or customary meaning. United States v. Snider, 502 F.2d 645 (4th Cir. 1974).

We submit that the term "longshoreman" has been generally understood to mean those employed at a waterfront facility handling and processing waterborne cargo, and includes those who operate the machinery to accomplish this end. Indeed, the entire process of transferring waterborne cargo to land conveyance has traditionally constituted the work of longshoremen. As this Court noted in International Container Transport Corp. v. New York Shipping Association, 426 F.2d 884, 886 (2d Cir. 1970):

8/It is not suggested that Congress intended to provide compensation for any injury which a person denominated a longshoreman might sustain, e.g., a hunting accident. The Act, when read as a whole, requires that the injury arise out of and in the course of employment, Act § 2(2), 33 U.S.C. 902(2), and be sustained in a covered area, Act § 3(a), 33 U.S.C. 903(a) (Supp. II, 1972). Once these conditions have been satisfied, however, it is submitted that Congress intended the prompt payment of compensation to the longshoreman without litigating the specific activity being performed at the time of injury.

> Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers.

Accord, Humphrey v. International Longshoremen's Association, A.F.L.-C.I.O., 401 F. Supp. 1401, 1406 (E.D. Va. 1975):

> For several decades, employees represented by the I.L.A. have performed essentially all the labor required in loading and unloading cargo at piers and waterfront terminals * * *. This work included cargo repair and maintenance, the preparation of cargo for loading, the sorting of cargo according to consignees and types, and the delivery of cargo to trucks o[r] other inland carriers, as well as the physical loading and unloading of cargo ships.9/

In Victory Carriers, Inc. v. Law, supra, the Supreme Court held that no "unseaworthiness" remedy was available under federal maritime law to a longshoreman injured by a defective forklift while shuttling cargo between a storage area on a pier and shipside. In response to the argument that there was no reasonable distinction between such a case and those in which such a remedy had previously been held available, the Court made two points.

9/See also Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963); Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971); Garrett v. Gutzeit O/Y, 419 F.2d 228 (4th Cir. 1974); Kinsella v. Zim Israel Navigation Co., Ltd., 513 F.2d 701 (1st Cir. 1975).

First, extension of an unseaworthiness remedy to longshoremen injured on the pier, while loading or unloading ships, by shore-based equipment would not avoid the disparity in treatment anyway, since it

> * * * would not equalize the remedies which both this Court and Congress have recognized are available to longshoremen injured on navigable waters and those injured ashore, whether in service of a ship or not.
>
> [404 U.S. at 212-13 (emphasis supplied).]

As the Court's discussion of this point makes plain, its import was precisely that there are many longshoremen whose work on waterfront land areas is not "in service of a ship," and that the relevant determinant of that status - whether the work was part of "loading" or "unloading" a ship - would be difficult to apply. Since the "unseaworthiness" remedy was limited by its very nature to "ship's service employment," its extension ashore was an inappropriate vehicle by means of which to "equalize the remedies available to longshoremen."

Second, the Court pointed out that it was in a poor position to evaluate the appropriateness of such an equalization in any event. There were "other employees [than shoreside longshoremen] operating forklifts for other employers in perhaps equally hazardous circumstances" whose remission to "the mercies of state [workers' compensation] law" would be unaffected by extension of a federal

remedy only to longshoremen; hence the claimed special "hazards of the longshoreman's occupancy" did not necessarily distinguish him from other shoreside workers, and "[c]laims like these are best presented in the legislative forum, not here." 404 U.S. at 215-16.

Ten months after the Victory Carriers decision, Congress enacted the amendments to the Longshoremen's Act which are here in issue. Yet the maritime cargo-handling industry, as represented by petitioners herein, asserts that Congress adopted the very criteria for entitlement to the Act's remedies which the Court rejected as determinants of "unseaworthiness" rights. Although the Victory Carriers opinion clearly recognized that not all longshoremen working on the pier were engaged in "ship's service" employment or "loading and unloading" (whatever might be the uncertain contours of those formulations), petitioners argue that when Congress said "any longshoreman" it meant only those longshoremen engaged in such activities. And although Victory Carriers pointed out that the principal item of equipment utilized by shoreside longshoremen, the forklift truck, was far from unique to them, petitioners argue that it is only those longshoremen exposed to some special hazards of the immediate

transfer of cargo between piersid storage and ship's hold who are within the Act's intended shoreside coverage. In short, petitioners' suggestion is that Congress did precisely what the Victory Carriers opinion most cogently pointed out would be an inappropriate solution to the lack of uniformity of remedy for injured longshoremen.

The distinction between the claimants in these cases and longshoremen involved in the immediate "loading and unloading" of vessels - like the plaintiff in Victory Carriers - is wholly unrelated to differences in either the function of their duties or the hazards of their employment. As the many pre-1972 "unseaworthiness" cases involving movement, sorting, and stacking of cargo, and loading and unloading of trucks and rail cars, on piers and terminals indicate,[10/] such activities are sometimes conducted continuously in time with the transfer of the cargo onto and off ships, and are, under such circumstances,

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10/A number of such cases are collected in Part V of Judge Craven's dissenting opinion upon the panel decision in I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1097-1100 (4th Cir. 1975), rehearing en banc granted, March 12, 1976.

"in service of a ship." As the cases under review herein demonstrate, the very same activities are sometimes conducted discontinuously in time with the vessel's presence in port. In either event, the risks are the same; in either event, the function of the work as a part of the transfer of the cargo between land and waterborne transportation is identical; and in either event, that function is, and has traditionally been recognized as, longshoremen's work.

To the extent that the legislative history is significant in interpreting the meaning of § 2(3), the intent of Congress is best exemplified by its recognition that

> * * * with the advent of modern cargo-handling techniques, <u>such as containerization</u> * * *, more of the longshoreman's work is performed on land than heretofore.
>
> [S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10 (emphasis supplied).]

This statement demonstrates that Congress - like the Supreme Court in <u>Victory Carriers</u> - did not consider "longshoremen's work" to be limited to the transfer of cargo between ship

and "point of rest." Indeed, Congress could not have considered "longshoremen's work" to be so limited since "modern cargo handling techniques" - of which containerization is the most spectacularly growing example[11/] - reduce the amount of longshore labor expended in moving cargo between "point of rest" and ships.[12/] Congress could only have been referring to that part of the cargo-handling process shoreward of the "point of rest" - primarily the stuffing and stripping of containers, which is performed to the greatest extent possible before the vessel arrives and after it has left, and in which the largest portion of the labor necessary to the "overall process of loading and unloading" containerized cargo is expended. Such work ashore replaces virtually all of the longshoreman's work aboard ship in stowing break-bulk cargo securely in the vessel's hold, so that what is, in effect, the same "longshoremen's work" is performed more and more on land - beyond the "point of rest."

11/See n.20 infra, at 35.

12/See discussion infra, at 34-38.

The Director submits that given the definition applied to the duties of longshoremen by this and other Courts - and its recognition by Congress - it is ineluctable that the jobs being performed by the claimants in the instant case when injured bring them clearly within the coverage of the Act. Caputo and Dellaventura were delivering cargo to the trucks of consignees or other carriers; Scaffidi was preparing cargo for loading (i.e., positioning a stuffed container for loading aboard ship), Blundo was assisting in sorting cargo for delivery to consignees (i.e., checking cargo being stripped from a container.[13] None of the claimants would be covered "just because they [were] injured in an area adjoining navigable waters used for [loading and unloading vessels]." S. Rep. No. 92-1125, 92d Cong., 2d Sess at 13.[14] Rather, they are covered because they are longshoremen within the commonly understood meaning of the term as used in § 2(3) of the Act, 33 U.S.C. 902(3) (Supp. II, 1972).

The claimants herein were not only longshoremen, however, but were also engaged in an integral part of a longshoring

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13/ Indeed, Blundo's duties are specifically referred to in the legislative history: "* * * checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." S. Rep. No. 92-1125, 92d Cong., 2d Sess. at 13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 11.

14/ Identical language is contained in H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 11.

operation. As with the term "longshoremen," the Act does not define "longshoring operations." Petitioners, however, rely on the narrow definition once promulgated by the Secretary of Labor:

> * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

The definition made its first appearance in 1960, long before the Amendments' shoreward extension of the Act's coverage, in the original safety regulations for longshoring promulgated pursuant to the addition of the present § 41 of the Act by Congress in 1958.[15/] 29 CFR 9.3(i), 25 Fed. Reg. 1566 (1960). The statutory authority for regulation of employment safety was repeatedly limited to "places of employment" and "employments" "covered by this Act." Act § 41(a), (b)(1), (b)(3), (c), 33 U.S.C. 941(a), (b)(1), (b)(3), (c). Hence the authority was subject to the same limitations as the Act's compensation coverage provisions. It has never been the position of the Secretary that the geographical limitations of the pre-1972 Longshoremen's Act were in any way part of the inherent meaning of the term "longshoring operations;" rather, the last clause of the definition reflects the limitations of the pre-amendment Act rather than any meaning inherent in the term itself. The rest

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15/ Pub. L. 85-742, § 1, 72 Stat. 835 (1958)

of the definition states the ordinary meaning of the term without reference to the location at which the operations are performed - "the loading, unloading, moving, or handling of cargo, ship's stores, gear, etc.," whether aboard ship or on waterfront land areas. Were the scope of the shoreside coverage of "longshoring operations" to be limited to the scope of the definition formulated under the pre-1972 Act, it would apply nowhere but aboard ship.

"Longshoring operations" should not be equated with merely "loading or unloading." Although the legal meanings of these latter terms is a very long way from settled, they have some application in law. Cf. Victory Carriers v. Law, 404 U.S. 202, 212 (1971). Surely if Congress had meant to confine the Act's shoreside application to "persons engaged in loading or unloading a vessel" it would have used these judicially familiar words rather than the broader phrase "longshoring operations." Moreover, the terms "loading and unloading" are not themeselves terms of art and cannot be narrowly or hypertechnically construed. Cf. Hagans v. Ellerman & Bucknall Steamship Co., 318 F.2d 563 (3d Cir. 1963); Garrett v. Gutzeit, O/Y, 491 F.2d 228 (4th Cir. 1974).[16/]

16/ Indeed in I.T.O., supra, n.6, while the court denied the Act's coverage, the majority concluded that each of the claimants was engaged in either the overall loading or unloading process; claimant Adkins was loading cargo, which had been discharged from a vessel, onto a delivery truck; claimant Brown was loading cargo into a container; claimant Harris was operating a hustler which moved containers through the termina

Even assuming arguendo that the term "loading or unloading" does affect the "status" of an employee who is engaged in longshoring operations,[17/] any attempt to limit coverage to a place denominated the "point of rest" must fail.

A "point of rest" is mentioned in neither the Act nor its legislative history. In its absence, the Director submits that any attempt to interject this term as a limitation in interpreting the language of the § 2(3) definition of "employee" should be rejected.

As Judge Craven aptly noted in his dissenting opinion in I.T.O. Corporation of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975) rehearing en banc granted March 12, 1976:

> If Congress, as appellants claim, meant to embrace the concept of the 'point of rest' as a demarcation line between 'maritime' and 'nonmaritime' employment, why was this 'generally understood' doctrine not explicitly written into § 902(3) of the Act, defining 'employee', or at the very least, mentioned

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17/ It is significant that the terms loading and unloading are only used to identify the Act's "situs":

> * * * including any adjoining pier * * * or other adjoining area customarily used by an employer in loading [or] unloading.
>
> [Amendments, §§ 2(b), 2(c), 86 Stat. 1251, 33 U.S.C. 902(4), 903(a) (Supp. II, 1972).]

In so defining "situs" Congress did not limit the use of these terms to that area which would generally be considered the place where the transfer of cargo onto or off vessels occurs, i.e., a pier or terminal. Rather, Congress used these terms in a more expansive fashion to include any area that may be customarily used for any part of this total process. See infra at 34-38.

> in the legislative reports? Surely a concept of such alleged widespread use and application is too conspicuous by its absence to be read into the statute. This Court has no license to find in a statute words which the Congress did not put there.
>
> [529 F.2d at 1096.]

The "point of rest" is in fact not readily identifiable nor a uniformly applicable term. While the employers in I.T.O. advanced this concept to support their interpretation of the legislative history of the 1972 Amendments, they conceded that the location of this point varies from port to port, and thus permits stevedoring operators and terminal operators to unilaterally shift this point seaward or shoreward as they desire.[18/] See I.T.O. Corporation of Baltimore v. Benefits Review Board, supra, 529 F.2d at 1095-1096 (dissenting opinion).

It must be further noted that nothing in the legislative history suggests that it was Congress' intent to cover only those "employees" seaward of an elusive "point of rest."

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or

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18/ The elusiveness of such a concept is most readily exemplified in the case of Blundo, wherein the container which Blundo was checking at the time of his injury was initially off-loaded at Port Elizabeth, then stripped at the 21st Street Pier in Brooklyn.

> holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.
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> [S. Rep. No. 92-1125, 92d Cong., 2d Sess. at 13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 10-11.]

The "typical example" does no more than state that those physically removing cargo from a vessel are covered. This example does not attempt to identify who else is covered nor does it attempt to delineate any <u>portion</u> of either the longshoring operation or the loading and unloading process during which coverage attaches to the exclusion of other portions. As a matter of fact, the Committees' reports only reveal that they had no intention of covering clericals and persons whose presence at a covered area was merely to pick up stored cargo. Such persons are clearly not engaged in a longshoring operation; their presence on the waterfront is not for purposes of moving or handling waterborne cargo. The reports, therefore, do not justify the adoption of a concept called "point of rest" as determinative of coverage,

As a preliminary matter it should be noted that the phrase "* * * customarily used by an employer in loading [or] unloading * * * a vessel * * *" refers only to "other adjoining areas" and not to "any pier [or] terminal * * *." Any other interpretation would require a finding that the statutory provision contains surplusage:

19/ [footnote cont'd]

Aside from the Director's contention that the petition for review in Dellaventura should be dismissed (see n.2, supra at), it is submitted that the situs issue is not properly before this Court in any event. Section 21(c) of the Act, 33 U.S.C. 921(c) (Supp. II, 1972) restricts the jurisdiction of this Court under the Act to review of final orders of the Benefits Review Board. The Board did not rule on the situs issue; rather, it noted that petitioners sought only to challenge the administrative law judge's finding regarding Dellaventura's status (Dellaventura App. 4a). In fact, the Board's sole mention of the situs issue was in recounting the relevant factual history of the case. Obviously such does not amount to a review of a decision on the situs issue.

The Act provides that a compensation order shall become final unless review is sought within thirty days after the order is filed. Act § 21(a), 33 U.S.C. 921(a). See also 20 CFR 802.205 (1975). The Board's Rules and Regulations require the filing of a petition for review containing "a statement indicating the specific contentions of the petitioner and describing with particularity the substantial questions of law or fact to be raised by the appeal." 20 CFR 802.210 (1975). No such review of the situs issue was sought before the Benefits Review Board by the petitioners in Dellaventura; therefore, they may not now be heard to raise that issue in an attempt to leap-frog the administrative review procedure.

An analogy can be drawn to the requirement that parties seeking judicial review must first exhaust their administrative remedies. Petitioners failure to seek review of the situs issue before the Benefits Review Board pursuant to § 21(b) of the Act amounts to a failure to exhaust their administrative remedies. The fact that that remedy is no longer available does not negate the fact that petitioners failed to pursue those remedies to exhaustion.

> * * * including any adjoining pier, * * * terminal, * * * or other adjoining area customarily used by an employer * * *.
>
> [33 U.S.C. 903(a).]

Since the word "adjoining" is used twice in the statute, it is clear that the second part of the sentence is separate from the first. As a matter of fact, if the phrase "* * * customarily used * * *" were meant to apply to the entire list of places covered, that list ("* * * pier, wharf, dry dock, terminal, building way, marine railway * * *") would itself be surplusage, since the alleged purpose of - to covering only those areas customarily used in loading and unloading - could have been more easily accomplished by merely stating that the navigable waters of the United States included "any * * * adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

Secondly, the Director submits that the activities engaged in by each of the claimants herein were parts of the "loading and unloading" process, and hence the places at which such activities are conducted are "customarily used in loading [or] unloading" vessels. Loading and unloading cannot be so narrowly construed as to mean only the immediate physical transfer between ship and stringpiece or other "point of rest." Rather, loading and unloading are processes which begin with arrival of export cargo at the pier or terminal and, inversely, continue until delivery

of import cargo to the consignee. Cf. American Presidential Lines v. Federal Maritime Commission, 317 F.2d 887 (D.C. Cir. 1962).[20/]

Finally, and most conclusively, even if a "pier [or] terminal" need be "customarily used" in loading and unloading vessels to come within § 3(a) of the Act, 33 U.S.C. 903(a) (Supp. II, 1972); and even if, furthermore, loading and unloading are narrowly construed to include only the immediate transfer of cargo onto or off a vessel, still the places at which the injuries occurred in each of the cases under review are within § 3(a). While the precise points at which the injuries occurred were not used for such narrowly-construed loading and unloading, those "points" are not the relevant determinants under § 3(a); rather, the statutory language looks

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20/ Containerization is an improved cargo handling technique. Prior to its implementation, outbound cargo would be delivered to the terminal facility and would, e.g., be stacked on pallets when the vessel arrived and then loaded on board; the reverse would occur with inbound cargo. Longshoremen would perform all of the movement or handling of this cargo within the terminal complex and upon the vessel. Due to space limitations and the organization of longshore gangs, a great deal of this operation would occur in a continuous uninterrupted process. Containerization accomplishes the same ends; because they hold such a quantity of cargo and protect it the containers, once discharged from a vessel, can be moved to one end of the pier or terminal complex and the vessel is free to depart. If the container of cargo is for one consignee it can be hauled directly from the terminal complex. However, a container of mixed cargo, i.e., cargo for different consignees, must be "stripped," ie., unloaded, with the same sorting, counting, and stacking as cargo that was formerly discharged on pallets. Moreover, containerization makes it easier to move the cargo, if necessary, within the terminal complex.

In amending the Act, Congress recognized that containerization had altered the process of handling waterborne cargo so as to require the increased use of waterfront land areas in longshoring operations. See discussion supra at 24-25.

to the use to which the pier, terminal or other area is used. Petitioners' contentions that the injuries herein did not occur at locations within § 3(a)'s coverage rest exclusively on segmentation of a "pier" into "portions" or "points" admittedly used in "loading and unloading," and those not so used, with coverage extending only to the former. Such segmentation is in direct conflict with the inclusive terms of § 3(a). Furthermore, it would significantly detract from the very intention of Congress, in creating a uniform compensation system applicable to employees (as defined by § 2(3) of the Act, 33 U.S.C. 902(3) (Supp. II, 1972)) injured on "* * * any adjoining pier, wharf * * * [or] terminal, * * * or other adjoining area customarily used by an employer in loading [or] unloading * * * a vessel * * *" (emphasis supplied), to cover only those parts of the enumerated facilities which are customarily used for the immediate transfer of cargo onto or off vessels. The interpretation urged by petitioners runs afoul of Congress' desire to eleminate the "* * * disparity in benefits payable for death or disability for the same type of injury * * *" (S. Rep. No. 92-1125, 92d Cong., 2d Sess. at 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 10) caused by walking in and out of the Act's coverage.

The Director submits,[21] therefore, that each of the injuries herein occurred in an adjoining area - a "pier" - whose specific inclusion as "navigable waters" in amended

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21/ The Director takes exception to certain points contained in the Brief of Amicus Curiae National Association of Stevedores (N.A.S.) at 22-25. Certainly whether the Director is a proper party to these cases (as opposed to an indispensible party) is no longer at issue. This Court has granted each of the motions to amend and reform the captions submitted by the Director (Caputo, February 10, 1976; Dellaventura , March 16, 1976; Scaffidi, April 30, 1976; Blundo, February 10, 1976). In two of the cases (Dellaventura and Blundo) the Director's motion was granted over petitioners' opposition; and oral argument was had on March 16, 1976, on the motion in Dellaventura. The Director respectfully refers the Court to the memoranda submitted in support of each of the above-mentioned motions.

Even if the issue had not already been decided, however, petitioners' reliance on the decision of the United States Court of Appeals for the Fourth Circuit in I.T.O., supra, is misplaced since - as N.A.S. entirely omits to acknowledge - rehearing en banc was granted by that Court on March 12, 1976, on both the issue of the Act's coverage and the status of the Director as a party.

The Director is particularly concerned, however, with N.A.S.'s erroneous and completely unfounded accusations of improper conduct by the Solicitor of Labor and the Director regarding the Department of Labor's position following the Adkins decision. N.A.S. avers that the Solicitor "instructed" the Director to "disregard" the I.T.O. decision - an order which N.A.S. asserts was carried out obediently - all of which is purportedly documented by certain letters requested by N.A.S. and included in an appendix to its brief.

In reality N.A.S.'s assertions are not only false, but also completely unsupported by the documents it tenders. The Solicitor did not "instruct" the Director to do anything; the Solicitor did, however, advise his client that the Department's position, consistently and successfully maintained for three years through various lower administrative court litigation, need not be abandoned in the face of one adverse decision from a split panel of the United States Court of Appeals for the Fourth Circuit as to which petitions for rehearing were then pending. (Indeed, the validity of that advice has been at least inpart borne out by the Fourth Circuit's granting of rehearing en banc in I.T.O..)

[cont'd]

§ 3(a) of the Act obviates consideration of the use to which it is put; furthermore, that even if such consideration be necessary, the locations of the injuries were customarily used in the overall processes of "loading and unloading" vessels;[22] and finally, irrespective of the validity of either of the foregoing readings of § 3(a), that § 3(a) clearly does not require more than that the facility within whose confines an injury occurs be customarily used for loading and unloading, and each of the piers involved herein was so used even on the narrowest construction of "loading and unloading."

21/ [footnote cont'd]

The Director sumbits that it is not he or the Department of Labor, but the National Association of Stevedores which has no regard for the "judicial system of this nation," in failing to realize that the Director is entitled to maintain whatever legal position he believes correct until all avenues of appeal have been exhausted. This is in no way in derogation of N.A.S.'s right to request stays of payments, or whatever other relief it may think appropriate, in subsequent cases before administrative law judges the Benefits Review Board, the various United States Courts of Appeals, or other proper forums.

22/ This is the analysis which appears to have been employed in I.T.O., supra, 529 F.2d at 1083-84. The panel majority therein, despite its restrictive approach to the Act's new definition of "employee" (discussed supra at 15, n.6), accepted without difficulty the proposition that the broad geographical extension of the "navigable waters" in § 3(a) included in their entirety the large terminal complexes at which the injuries involved therein occurred. No cross-petitions for rehearing of such conclusion were filed.

II

CONGRESS' EXTENSION OF THE LONGSHOREMEN'S ACT TO SCAFFIDI'S INJURY DID NOT EXCEED THE LIMITS OF ITS LEGISLATIVE AUTHORITY.

Pittston Stevedoring Corporation has raised the additional argument in the case of John Scaffidi that the 1972 extension of coverage set forth in § 3(a) of the Act, if it includes Scaffidi's injury, is beyond the legislative power of Congress and is in violation of the Tenth Amendment to the United States Constitution. This argument is based on the premise that Congress' authority is limited to the scope of the federal admiralty jurisdiction as it has previously been exercised in cases of maritime contracts and maritime torts. Thus, petitioner argues, in effect, that the situs of Scaffidi's injury was not within traditional federal admiralty tort jurisdiction, nor can such jurisdiction be extended to reach the injury; and, further, that the nature of Scaffidi's employment at the time of his injury was not within the scope of federal admiralty contract jurisdiction, nor can that jurisdiction be extended so as to include such employment. The Director submits that both of these suppositions are incorrect and that, in fact, Congress did not exceed its authority when it extended the coverage of the Act to include shoreside injuries not directly related to a ship.

Scaffidi's injury was not within traditional admiralty tort jurisdiction for it did not occur on "navigable waters" in the ordinary sense, i.e., a body of water through which a vessel can pass. Likewise it is not within admiralty tort jurisdiction as extended by the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. § 740, which extended tort jurisdiction to shoreside injuries caused by a vessel on the water. The question then becomes whether Congress could extend admiralty tort jurisdiction to the pier, irrespective of a direct causal relationship to a vessel.

The 1972 Amendments designate certain land areas adjoining the water, including water front piers and terminals, as "navigable waters of the United States" for the purposes of the Act. 33 U.S.C. §§ 902(4) and 903(a).

The location of an injury upon the "navigable waters" has traditionally been the determinative factor in establishing admiralty tort jurisdiction. The form of the amendments, an extension of the definition of "navigable waters" for purposes of the Act, indicates that Congress intended to bring injuries occurring in the newly included land areas within the scope of maritime tort jurisdiction.

Originally, the position that admiralty jurisdiction over torts depended on the place where the wrong was consummated was regarded as too fundamental for argument. The Plymouth, 70 U.S. (3 Wall.) 20 (1866). When Congress, however, extended the jurisdiction to injuries to shore structures caused by vessels, for the limited purpose of limitation of liability proceedings,[23/] the Supreme Court refused to construe the statutory provision narrowly in order to limit it to the previously recognized scope of the jurisdiction. Richardson v. Harmon, 222 U.S. 96 (1911). Finally, in 1948, Congress extended the jurisdiction to all injuries on land caused by vessels, for all purposes. Admiralty Extension Act, supra, 46 U.S.C. § 740. This general extension of the jurisdiction to torts previously considered in American law to be non-maritime was upheld as well. United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953), cited with approval in Victory Carriers, Inc. v. Law, 404 U.S. 202, 209 n.9 (1971).

Thus, if a general extension of admiralty tort jurisdiction to land injuries based on the cause of the injury is permissible,

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23/ Act of June 26, 1884, 23 Stat. 57, 46 U.S.C. § 189.

the Director submits that experience and changing conditions in the maritime industry may equally justify a limited extension - for the purpose of workers' compensation - to land injuries based on the relationship of the person injured to maritime commerce.

At the same time Congress extended the Act's coverage geographically, it limited the Act's application to certain classes of workers. Not all employment injuries occurring upon the "navigable waters" (as extended) are within the coverage of the amended Act - only those to employees engaged in "maritime employment," as defined in § 2(3) of the Act to specifically include "any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker * * *."

As the Ninth Circuit observed in United States v. Matson Navigation Co., supra, quoting Detroit Trust Company v. The Thomas Barlum, 293 U.S. 21 (1934),

> * * * We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned * * *.
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> [201 F.2d at 616, quoting 293 U.S. at 52.]

Maritime employment in the most traditional sense means service to a vessel in navigation and maritime contract jurisdiction derives directly from this concept. However, service to a vessel is not a precondition of coverage of an individual under the Act inasmuch as it covers "any longshoreman," "any ship repairman," and, still less in accordance with traditional American legal notions of what service is "maritime," "any * * * shipbuilder [or] shipbreaker." The specific inclusion of such persons in the definition of "employee" in § 2(3) renders it immaterial under this Act whether such service is traditionally maritime. 1A Benedict on Admiralty § 16 at 22 (7th ed. rev. 1973).[24] It is unquestionable that the Act now applies to employment over which federal admiralty contract jurisdiction has not been exercised before.

However, the power and authority of Congress to declare such employment to be within such jurisdiction cannot be open to serious question.

Each category of employment enumerated in § 2(3) of the Act meets Justice Story's early statement of the general reach of federal maritime contract jurisdiction:

> * * * all contracts (wheresoever they may be made or executed * * *) which relate to the navigation, business or commerce of the sea.

24/ See discussion supra at 14-25.

De Lovio v. Boit, 7 Fed. Cas. 418, 444 (Fed. Cas. No. 3776) (C.C.D. Mass. 1815); see also Story, Commentaries on the Constitution of the United States § 1665, at 465 (5th ed. 1891): "The jurisdiction * * * extends * * * to all maritime contracts, that is, to all contracts touching trade, navigation, or business upon the sea, * * *."

The degree to which a class of contracts "relates to" or "touches" navigation and commerce, of course, is necessarily subject to disagreement. But it is now well-settled that it is within the legislative power of Congress to alter the judicial judgment that a class of contracts is not within the jurisdiction. In Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934), the Court sustained the Ship Mortgage Act of 1920,[25/] which attached a federal maritime lien to contracts which had previously been held not to be "maritime":

> The fact that mortgages on ships had not been considered to be maritime contracts was not conclusive as to the constitutional authority of the Congress to alter or supplement the maritime law in this respect,

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25/ Act of June 5, 1920, c.250, § 30, 41 Stat. 1000, as amended, 46 U.S.C. § 911 et seq.

> and thus to extend the admiralty jurisdiction, 'as experience or changing conditions might require,' while keeping within a proper conception of maritime concerns.
>
> 293 U.S. at 48.

The Thomas Barlum, supra, suggests that Congress could have declared employment relations between longshoremen and their employers to be matters of maritime contract without exceeding its power. More specifically (and more recently), the Court suggested that "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts." Nacirema Operating Co. v. Johnson, 396 U.S. 212, 215 (1969) (emphasis added). See also Victory Carriers, Inc. v. Law, 404 U.S. 202, 215-216 and n.16 (1971), a case heavily relied upon by Pittston for the proposition that precisely such an extension is unconstitutional.

It is interesting to note that Congress did not accept the full scope of the invitation of the Supreme Court in Nacirema. Rather, it enacted the narrower "situs" and "status" tests which cover neither all injuries on piers and terminals nor all injuries sustained by longshoremen. However, it certainly defies logic to argue that a narrower extension of jurisdiction than the one suggested by the Court in Nacirema could be an

unconstitutional exercise of federal maritime contract jurisdiction when the broader concept was already proposed by the Supreme Court itself. Thus, § 2(3) of the Act extending coverage to any employee with the status of being engaged in maritime employment, including "any longshoreman" (like Scaffidi) is a proper exercise of federal maritime contract jurisdiction. Furthermore, if the amendments are a valid exercise of either federal maritime contract jurisdictor or federal maritime tort jurisdiction, it must be sustained; "[s]ince a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone." Nacirema Operating Co. v. Johnson, supra, at 215-216 n.7 (1969).

But if any deficiency in Congress' authority to extend the Act ashore as the 1972 Amendments have done were found to exist under the admiralty power alone, such extension could not be denied effect unless Congress wholly lacked such authority. The presumption of constitutional validity which attaches to all duly enacted statutes could hardly be overcome by a showing

that a constitutional grant of power relied on in 1927,[26/] which was wholly adequate to support the law passed at the time, is inadequate to support the extension of that legislation enacted forty-five years later. Rather, Congress is deemed to have exercised all the authority it possesses to accomplish the end embodied in its enacments. See United States v. Carolene Products, 304 U.S. 144 (1938); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Thus, if it were found that the admiralty clause is an insufficient basis for the shoreside extension of the Act's coverage effected by the Amendments, that extension must nevertheless be sustained unless it is beyond the combined reach of the admiralty and commerce powers. The complementary character of the two powers has been familiar for well over a century. United States v. Coombs, 37 U.S. (12 Pet.) 72, 76-79

26/ The language and legislative history of the 1927 Act establish beyond question that it was enacted solely in exercise of Congress' authority to revise the general maritime law under the admiralty clause. The motivating force for passage of the Act was the apparent exclusivity of federal authority to provide a compensation remedy for at least a certain class of employees injured on the water. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924). The occasion to consider the Act as an exercise of any other power never arose.

(1838); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-192 (1824). The two powers are entirely distinct; either or both may justify legislation, and neither limits the other. The Genesee Chief, 53 U.S. (12 How.) 442, 452 (1851); The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1875).

Before the 1972 Amendments to the Longshoremen's Act could be found to be beyond the proper scope of federal legislative authority, then they must be measured against the whole of Congress' power derived from both sources. Pittston cannot limit the authority of Congress in 1972 by reference to the legislative history of a 1927 enactment; indeed, it could not even limit the basis for validity of the 1927 Act by such reference. United States v. Coombs, supra. We submit that the authority of Congress to extend a federal compensation remedy to employees in the maritime cargo-handling industry, as labor legislation under the commerce clause, is clear beyond argument. E.g., Second Employers' Liability Cases, 223 U.S. 1 (1912); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); cf. Katzenbach v. McClung, 379 U.S. 294 (1964).

The Tenth Amendment would therefore be inapposite because there are not one but two sources of authority on which Congress could have relied in enacting the 1972 amendments. Inasmuch as the Tenth Amendment only reserves to the states those powers not granted by the Constitution to the federal government, and both maritime and interstate commerce powers are so granted, the Tenth Amendment furnishes no ground for objection to the Act's extension.

CONCLUSION

For the foregoing reasons, the Director respectfully submits that the Benefits Review Board's affirmances of the awards under the Act to each of the claimants, based on the Board's consistent construction of the amended Act as applying to all longshoremen handling and processing cargo in the transfer between ocean and

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__/Application of the Longshoremen's Act to shoreside injuries does not, in any event, preclude the states from applying their own traditional police-power workers' compensation legislation to the same injuries. Umbehagen v. Equitable Equipment Co., 329 So. 2d 245 (La. App., 4th Cir., 1976); cf. Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

land transportation at waterfront piers and terminals, is fully in accordance with law; and that the extension of the remedies provided by the Act to such persons, injured at such places, is well within the legislative authority of Congress. It is therefore respectfully submitted that the decisions below should be affirmed.

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CERTIFICATE OF SERVICE

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